INDEX

Page

ARGUMENT 1

CONCLUSION 22

CITATIONS

CASES:

Aladdin Mfg. Co. v. Mantle Lamp Co., 116 F.2d 708 (C.A. 7) 3

Boilermakers v. Hardeman, 401 U.S. 233 ..... 10, 15, 17, 20

Calhoun v. Harvey, 379 U.S. 134 12

Carpenter's Union v. NLRB, 357 U.S. 93 18

Farowitz v. Musicians, 330 F.2d 999 (C.A. 2) 22

Fleischmann Corp. v. Maier Brewing Co., 386 U.S. 714 ..... 2, 3, 4, 7, 9, 21, 22

Gartner v. Soloner, 384 F.2d 348 (C.A. 3), cert. denied 390 U.S. 1040 ..... 13, 17, 19

Hecks Co. 191 NLRB No. 146, 77 LRRM 1513 (denying such relief) 13

Local 60, Carpenters v. NLRB, 365 U.S. 651 ..... 8, 13

Mills v. Electric Auto-Lite Co., 396 U.S. 375 .... 2, 3, 7, 21, 22

Musicians v. Wittstein, 379 U.S. 171 12

NLRB v. Fruit Packers, 377 U.S. 58 15

NLRB v. Marine & Shipbuilding Workers, 391 U.S. 418 15

Petroleum Exploration v. Public Service Commission, 304 U.S. 209 19

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 13

Republic Steel Co. v. NLRB, 311 U.S. 7 8

Page

Salzhandler v. Caputo, 316 F.2d 445 (C.A. 2) 22
South Carolina v. Katzenbach, 383 U.S. 301 2
Sprague v. Ticonic Nat. Bank, 307 U.S. 161 ..... 6, 14, 21
Teamsters Union v. Morton, 377 U.S. 252 8
Tiidee Products Inc., 194 NLRB No. 198, 79 LRRM 1175 13
Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 7
United States v. Kras ..... U.S. ....., 41 U.S.L.W. 4117 20
Wirtz v. Glass Bottle Blowers, 389 U.S. 463 12
Woodwork Mfrs. Assoc. v. NLRB, 386 U.S. 612 ..... 2, 17, 18

STATUTES:

Labor Management Reporting & Disclosure Act of 1959, 29 U.S.C. § 401 *et. seq.*:

§ 101 14
§ 101(a)(1) 20
§ 101(a)(4) 8, 15, 19, 20
§ 101(a)(2) 20
§ 101(a)(5) 15
§ 102 ..... 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 21
§ 102(b) 14
§ 104 4
§ 201(c) 9
§ 209 9
§ 210 ..... 4, 9
§ 304 4
§ 304(a) 4, 5, 9
§ 304(c) 9
§ 402(b) 9
§ 501(b) 4, 5, 6, 7, 8, 9
§ 502 9

Page

§ 503 9
§ 602 9
§ 610 ..... 9, 13

Securities Exchange Act of 1934, 15 U.S.C. § 77:
§ 14a 2
§ 16b 2

MISCELLANEOUS:

Department of Labor, Labor Management Services Admin., Union Financial Statistics 1960-1970 (Oct. 1972) Table 7, p. 26 20

Dept. of Labor Legislative History of the LMRDA 5, 7, 8, 11, 12, 13, 15, 16, 17

Supreme Court of the United States

October Term, 1972

No. 72-630

PAUL HALL, etc., et al.,

Petitioners,

v.

JOHN COLE

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of the petitioners, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 115 national and international labor unions, having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

1. "The general American rule is that attorneys' fees are not ordinarily recoverable as costs [, however,] both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indi-

cate the need for such a recovery." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-392. Where a statute is silent on the question of remedies,[1] and where the claim sued upon is not based on a statute, the courts have been required to fall back upon their own conceptions of sound policy in determining when exceptions to the general rule shall be declared. The void created by the lack of authoritative guidance from the legislature, "leave[s] the courts with the task • • • of determin[ing] whether the special circumstances exist that would justify an award of attorneys' fees • • •." *Id.* at 391. But, since Congress' power over remedies is plenary (cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325-327), where a statute is addressed to both rights and remedies, the judicial role is more circumscribed: it is to ascertain the intent of Congress by "reconstitut[ing] the gamut of values current at the time when the [statutory] words were uttered." *Woodwork Mfrs. Assoc.* v. *NLRB*, 386 U.S. 612, 620 (quoting L. Hand, J.).

In the present context, that task is simplified because, in response to this Court's long-standing rule "that attorneys' fees are not ordinarily recoverable in the absence of a statute • • • providing therefor," Congress has "selectively provid[ed for this] remedy in connection with various • • • statutory causes of action • • • by expressly allowing recovery of attorneys' fees." *Fleischmann Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717, 720-721, & n. 17. This

[1] Both § 14a of the Securities Exchange Act of 1934, the provision at issue in *Mills*, and § 16(b) of that Act, also discussed therein (396 U.S. at 390-391), establish rights without specifying in any way the relief to be awarded in a suit by a private party.

Court has, therefore, concluded that where Congress has specifically addressed itself to remedial considerations, in a manner which demonstrates that the remedies specified "mark the boundaries of the power to award monetary relief in cases arising under [that] Act," and has not expressly provided for attorneys' fees, a "judicially created compensatory remedy in addition to the express statutory remedies is inappropriate * * *." *Id.* at 721.[2] This approach, which has been followed without exception, so far as we are aware, provides Congress with a substantial measure of certainty as to the course of judicial interpretation, thereby assuring that in the area where Congress' powers are primary, the determination that an exception should be made to the "general American rule * * * that attorneys' fees are not ordinarily recoverable" (*Mills*, 396 U.S. at 391), will truly be the legislature's and not the court's.

2. Section 102 of the Labor Management Reporting and Disclosure Act of 1959, which states that in a Title I suit the courts are empowered to provide "such relief (including

---

[2] Indeed, such is the force of this presumption against implying the power to award attorneys' fees in a statutory context, that it was applied to trademark suits under the Lanham Act in *Fleischmann*, even though a pre-Lanham Act decision (*Aladdin Mfg. Co.* v. *Mantle Lamp Co.*, 116 F.2d 708 (C.A. 7)) had held that counsel fees were recoverable in a trademark action and the Lanham Act empowered the courts to grant relief "subject to the principles of equity;" circumstances which, but for that presumption, would have supported the opposite construction of that Act, on the ground that Congress "was aware of the Aladdin decision and intended to preserve the rule of that case." Cf. 386 U.S. at 722 (Mr. Justice Stewart dissenting).

injunctions) as may be appropriate," *does* "expressly provide the remedies for vindication of the cause[s created by Title I of the Act]" (*Fleischmann*, 386 U.S. at 720); and it *does not* expressly provide for attorneys' fees. Thus, under *Fleischmann*, § 102 must be construed as not authorizing attorneys' fees in Title I suits, unless the legislative materials make it perfectly plain that Congress understood the phrase "such relief" to authorize the granting of that extraordinary remedy. But those materials do not contain a single indication that the failure to specify attorneys' fees in § 102 was an oversight; on the contrary, they demonstrate beyond peradventure that Congress understood that in exercising jurisdiction under § 102 the courts would not have the power to grant such fees.

(a) The court below viewed the phrase "such relief as may be appropriate" as "unlimited language." Pet. App. 9a. But the pattern of the Act reveals that, at most, Congress was of the view that that language, standing alone, simply authorized substantive relief for the violation committed, in the form of damages, injunctions and accountings, as distinguished from incidental relief for the normal expenses of litigation, such as costs and attorneys' fees.

In the LMRDA, Congress used the phrases "appropriate relief" and "such relief (including injunctions) as may be appropriate" five times. See §§ 102, 210, 304(a) (twice), 501(b). In § 210, the phrase "such relief (including injunctions) as may be appropriate" identifies the type of relief which the Secretary of Labor alone may seek, relief which plainly would not encompass counsel fees incurred

by the Secretary. Its first use in § 304(a) also refers to suits by the Secretary; and it is unlikely in the extreme, that Congress would twice use the same language in a single subsection of a statute, with an intent to permit the granting of the extraordinary remedy of attorneys' fees in one instance but not in the other. Moreover in a third instance, § 501(b), union members "may recover damages" or "secure an accounting" or "other appropriate relief," *plus* "the fees of counsel" and "any expenses" of the litigation.

The position of the court below must, therefore, be based on the proposition that the phrase "such relief" in § 102 has a different meaning than it does in every other instance in which it is used in the LMRDA. There is nothing in the evolution of that section to support that view. The predecessor to § 102 (§ 103 of Senator McClellan's floor amendment to S. 1555, 86th Cong. 1st Sess. (Dept. of Labor Leg. Hist. of the LMRDA pp. 248-249)) also used the phrase, "such relief as may be appropriate including, but without limitation, injunctions to restrain any such violations and to compel compliance with this title," to identify the type of relief which the Secretary of Labor alone might seek, relief which, as just noted, plainly would not encompass attorneys' fees. Again, it is unlikely in the extreme, given its derivation, that Congress would have retained the phrase "such relief" in § 102 of the LMRDA, if its intent had been to authorize the courts to grant attorneys' fees. Indeed, the phrase "including injunctions" was added to § 102 in Conference, in evident recognition of the fact that the logical reading of the phrase "such relief as may be appropriate," standing alone, when the remaining sections of the Act

providing civil remedies, and the predecessor to § 102, contained explicit references to injunctions, was that it only authorized damages. And, of course, the authority to grant attorneys' fees is not part of the law of damages; "[t]he foundation for the historic practice of granting reimbursement for the cost of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." *Sprague* v. *Ticonic Nat. Bank*, 307 U.S. 161, 166. Nor can the limited grant of the authority to issue "injunctions," the staple of equity jurisprudence, be transformed into a grant of jurisdiction to award non-injunctive relief of a character authorized by equity in the special circumstances presented by such cases as *Sprague*.

Thus, if the phrase "such relief" is to be given a consistent meaning throughout the LMRDA, it can not be construed as including the authority to grant attorneys' fees. And, of course, the normal presumption, overcome only by compelling legislative history to the contrary, is that Congress is consistent in its word-usage when drafting statutes.

(b) Section 501(b), pursuant to which a union member, who secures leave of court, may bring a derivative action on behalf of his union, against an officer or agent of the labor organization who has violated his fiduciary obligations, where such organization has refused or failed to sue those officers, is triply instructive in regard to Congress' intent. First, as just noted, its language alone, which empowers the courts to provide "damages," an "accounting," and "appropriate relief," in addition to the "fees of counsel," tends to rebut the suggestion that Congress utilized

the phrase "such relief as may be appropriate" as a catch-all which includes the authority to assess attorneys' fees.

Second, it demonstrates that the sponsors of the LMRDA were aware of, and guided by, the general principle that attorneys' fees are recoverable in a statutory action only where expressly authorized. See pp. 1-3 *supra*. "A primary judge-created exception to * * * the general American rule * * * that attorneys' fees are not ordinarily recoverable * * * has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself." *Mills*, 396 U.S. at 392. And the derivative suit for the breach of fiduciary duties created by § 501(b), was expressly based on shareholder's derivative suits such as that in *Mills* itself. Dept. of Labor Leg. Hist. of the LMRDA p. 1028 (Sen. Javits). Thus, if Congress had been of the view that the phrase "appropriate relief" was sufficient to incorporate the "judge-created exception[s]" to the "general American rule" into a statute, it would have manifested that understanding in § 501(b), for the suits authorized therein fall within the class in which the practice of awarding attorneys' fees was most firmly established. But even in § 501(b), Congress did not leave the matter to inference; true to its consistent pattern (see *Fleischmann*, 386 U.S. at 721 n. 17), it provided for attorneys' fees expressly.

Third, the theme which runs through the congressional enactments regulating union conduct is an extreme reluctance to authorize remedies which might provide the occasion for harassing litigation. This attitude of restraint is a legislative response to the "free-wheeling judicial exer-

cises" which had characterized the era of "government by injunction." *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 382-383. Thus, the central purpose of the Norris-La Guardia Act is to limit the equity powers of the courts. And in the National Labor Relations Act, as amended by the Labor Management Relations Act, Congress was at pains to assure that the Board would not have the authority to impose "punitive" remedies. See, e.g., *Local 60, Carpenters* v. *NLRB*, 365 U.S. 651; *Republic Steel Co.* v. *NLRB*, 311 U.S. 7. Moreover while Congress, in § 303 of the LMRA, authorized private suits in which actual damages for certain unfair labor practices may be recovered, it deliberately precluded the award of attorneys' fees or punitive damages. See *Teamsters Union* v. *Morton*, 377 U.S. 252, 260-261, with special reference to n. 16 quoting Sen. Taft. And, precisely because it was recognized that Title I lawsuits can be used as weapons to "break up a union" (Dept. of Labor Leg. Hist. of the LMRDA p. 296 (Sen. Clark), the protection of the right to sue accorded in § 101(a)(4) is limited by the proviso, "That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition." See generally Dept. of Labor Leg. Hist. of the LMRDA, pp. 295-298. Section 501(b) is in conformity with this overall pattern. While permitting attorneys' fees, it contains a critical safeguard against "strike" suits by providing, "No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown." But there is no such limitation in § 102. For that section, as Congress wrote it, simply pro-

vides substantive relief for the violation committed, in the form of damages and an injunction, as distinguished from incidental relief for the normal expenses of litigation, in the form of attorneys' fees.

In sum, when the LMRDA is viewed in its entirety, and against the background provided by prior labor legislation, a careful and explicit set of "intricate remedies" (*Fleischmann*, 386 U.S. at 719) becomes evident. Section 102 is but one of the remedial provisions afforded union members; see also §§ 201(c), 304(a) and 501(b). These are supplemental by both criminal sanctions, and civil remedies afforded the Secretary of Labor. See, §§ 209, 210, 303(b), 304(a), 304(c), 402(b), 502, 503, 602 and 610. But in only two instances—not including § 102—has Congress specifically authorized the recovery of attorneys' fees. See §§ 201(c) and 501(b).[3] Thus here, as in *Fleischmann*, the statutory scheme compels the conclusion that a "judicially

[3] Section 501(b) has already been discussed; pp. 5, 6-8 *supra*. Under § 201(c), a union member may sue to enforce the labor organization's duty to make available certain specified information and records; and the court may, "in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." There is no explanation of the inclusion of an award of attorneys' fees in § 201(c). But it would appear that it was provided since there would be no incentive for an individual union member to bring a § 201(c) suit in its absence, in light of the fact that a violation does not infringe individual, as opposed to group, rights. In contrast, Title I suits grow out of alleged violations which affect the complaining party as an individual, through the loss of membership rights, a fine, the imposition of higher dues, etc.; personal interests which provide ample incentive to bring suit.

created compensatory remedy in addition to the express statutory remedies is inappropriate" (386 U.S. at 721).

(c) The background to the enactment of § 102 further solidifies the conclusion, apparent from the language and structure of the LMRDA, that Congress did not intend to authorize the award of attorneys' fees in Title I litigation:

> "[Title I] began life as a floor amendment to S. 1555, the Kennedy-Ervin Bill, in the 86th Congress. [That title as] proposed by Senator McClellan, and as adopted by the Senate on April 22, 1959 * * * did not long survive. Two days later, a substitute amendment was offered by Senator Kuchel, who explained that further study of the McClellan amendment had raised 'some rather vexing questions.' * * * The Kuchel substitute, [was] adopted the following day * * *" *Boilermakers* v. *Hardeman*, 401 U.S. 233, 243.

As already noted (p. 5 *supra*), the McClellan amendment provided for enforcement through the Secretary of Labor. The Kuchel substitute, which included § 102 in its present form (except that it omitted the phrase "including injunctions"), modified the McClellan amendment by providing that Title I would be enforceable by private suits.

The argument for this modification stressed by its sponsors, as developed by Senator Kennedy in his statement of objections to the McClellan amendment, which provided the foundation for the Kuchel substitute, was that they were "reluctant to have the Secretary of Labor and the Attorney General become involved in all matters which may be considered when we talk about equal protection of rules and regulations and equal rights and privileges"; and

that, as Senator Clark noted, they, therefore, desired to "take the Federal bureaucracy out of this bill of rights and leave its enforcement to union members, aided by the courts." Dept. of Labor Leg. Hist. of the LMRDA, pp. 264, 290; see also p. 271 (Sen. Kennedy), p. 283 (Sen. Johnson of Texas), pp. 284 and 288 (Sen. Kuchel). Neither this argument, nor the subsidiary points advanced to buttress it, lend any support to the contention that those Senators intended § 102 to include the authority to award attorneys' fees. And, the debate on the extent to which employer financing of Title I suits should be prohibited (noted at p. 8 *supra*), which occurred immediately after § 102 had been discussed, with its references to the fact that "an employee could go to a bank to borrow money for his defense" (Dept. of Labor Leg. Hist. of the LMRDA p. 297 (Sen. Clark)), and which resulted in the decision to add the word "interested" before "employer," in order to protect the right of the member "to borrow from a friend to start a suit" (ibid), strongly suggests a common assumption that the member, and not the union, would finance Title I lawsuits.

Indeed, the assertion that Title I was intended to authorize attorneys' fees is directly contrary to the essential thrust of the Kuchel substitute. In 1959 there was no significant opposition to labor union "reform." The opposing philosophies which sought expression in the LMRDA were, on the one hand, that the trade union movement was so deeply flawed by corrupt and undemocratic practices that far-reaching legislative remedies were necessary, even if that legislation imperiled basic and entirely legitimate

union institutional interests; and on the other, that:

> "A strong independent labor movement is a vital part of American institutions. The shocking abuses revealed by recent investigations have been confined to a few unions. The overwhelming majority are honestly and democratically run. In providing remedies for existing evils the Senate should be careful neither to undermine self-government within the labor movement nor to weaken unions in their role as the bargaining representatives of employees." Dept. of Labor Leg. Hist. of the LMRDA, p. 118 (S. Rep. No. 187, 86th Cong. 1st Sess.).

As this Court has recognized, it was the latter philosophy which prevailed. See, e.g., *Calhoon* v. *Harvey*, 379 U.S. 134, 140; *Musicians* v. *Wittstein*, 379 U.S. 171, 178-179; *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463, 470-471. Its leading exponents were Senators Kennedy, Kuchel and Clark. The softening changes they secured to the McClellan amendment, including the provision for private suits, rather than suits by the Secretary of Labor, to enforce Title I, were intended to "eliminate some of the more stringent requirements of Senator McClellan's Bill of Rights" (*Wittstein*, 379 U.S. at 179), in order to produce "a compromise bill of rights acceptable to labor" (Dept. of Labor Leg. Hist. of the LMRDA p. 315 (Sen. McClellan)). It turns matters on their head to suggest that in modifying § 102, they sought to accomplish a change by which the unions themselves, rather than taxpayers generally, would finance the prosecution of Title I litigation.

In the House, Representatives Landrum and Griffin incorporated § 102, as it had passed the Senate, in their

substitute for the bill reported out by the House Committee on Labor and Education. And the House adopted this portion of the Landrum-Griffin bill as proposed. See Dept. of Labor Leg. Hist. of the LMRDA pp. 325-326, 361-362.

Neither Representative Landrum or Griffin discussed § 102 directly in explaining their substitute. But in defending the interrelated decisions to delete § 607 of the Senate bill (which had provided criminal sanctions for unlawful discipline of members engaging in activities protected by the LMRDA), and to limit criminal penalties to acts of physical violence directed at those exercising the rights guaranteed by the Act (see § 610 of the LMRDA; Dept. of Labor Leg. Hist. of the LMRDA p. 1117), Representative Griffin did explain his approach to the enforcement of Title I:

> "The substitute bill provides that denial of rights guaranteed by the act through union discipline shall be unlawful; however, unlike S. 1555, the substitute provides for civil, rather than criminal, enforcement. In our judgment, the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act and, accordingly, we do not believe that criminal sanctions are warranted." Dept. of Labor Leg. Hist. of the LMRDA p. 1117.

Since it was perfectly well settled at the time that the relief provided by the NLRA was limited to compensation for the actual loss caused by a violation (see *Local 60 Carpenters*, 365 U.S. 651; *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177), and it had never even been suggested that the litigation expenses of a charging party before the

NLRB were compensable, the equation drawn between Title I and the NLRA, supports the view that the sponsors of § 102 did not intend to authorize the award of attorneys' fees.[4]

Aside from the foregoing, the only statements at all in point by House members who might be considered supporters of § 102 of the LMRDA, were by Representatives Elliot and O'Hara, who noted, while explaining § 102(b) of the House Committee bill, which provided authority to "restrain [§ 101] violations and to grant such other and further relief as may be appropriate," that that section "would give 'a wide latitude to grant relief according to the necessities of the case,' [Rep. Elliot] * * * to cover 'any loss suffered by a member.' [Rep. O'Hara]" (Pet. App. 9a). The court below found these "sufficient for us to include the awarding of counsel fees here." *Ibid.* But these highly general statements point rather to the conclusion that § 102 provides complete relief under the normal law of damages, and of

---

[4] In 1972 the Board, for the first time in its history, awarded attorneys' fees to a charging party, on the ground that in that case the respondent-employer's defenses were "frivolous." *Tiidee Products Inc.*, 194 NLRB No. 198, 79 LRRM 1175; compare *Heck's Inc.*, 191 NLRB No. 146, 77 LRRM 1513 (denying such relief). The *Tiidee* decision, like *Gartner* v. *Soloner*, 384 F.2d 348 (C.A. 3) cert. denied 390 U.S. 1040, the prior authority relied on below, rests on the view that the courts and administrative agencies, in enforcing specific statutory mandates containing no express provision for attorneys' fees, are free to follow the general equity principles stated in *Sprague*, 307 U.S. at 166. And, since the range of the Board's ruling is far more limited than that of the court below, the former's validity would appear to follow *a fortiori*, should this Court affirm in the instant case.

injunctions, for the direct consequences of a violation, but does not provide authority for the granting of incidental relief associated with the costs of litigation through the extraordinary remedy of attorneys' fees. Certainly, they are not definite enough to be a "sufficient" base for the opposite conclusion.

The short of the matter is that there is not a single direct assertion by the sponsors of § 102, that that section did provide for attorneys' fees. "The silence of the sponsors is pregnant with meaning." *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66.

This silence can not be attributed to a failure by those who opposed § 102, on the ground that it was not sufficiently comprehensive, to press their case. Senator Goldwater, who led the opposition, took the unusual step of appearing before the House Committee on Education and Labor to develop the arguments for House action which would make the inhibitions on union action contained in the Senate bill more stringent. In some particulars he was successful. For example, his testimony provided the genesis for the House amendment to § 101(a)(4), which shortened the period of exhaustion of internal remedies prior to filing suit from 6 to 4 months, in order to preserve access to the NLRB. See Dept. of Labor Leg. Hist. of the LMRDA pp. 307-308; compare *NLRB* v. *Marine & Shipbuilding Workers*, 391 U.S. 418, 425-428. In others, the House followed the Senate in rejecting the position Senator Goldwater espoused. For example, the Senator was highly critical of the Senate bill's failure to require that discipline "be based on activity that the union had proscribed prior to the union member being

engaged in such activity." Dept. of Labor Leg. Hist. of the LMRDA p. 308. But the House, nevertheless adopted § 101(a)(5), as it passed the Senate. Even in those instances, as the Court squarely recognized in *Hardeman*, 401 U.S. at 244, Senator Goldwater's description of the scope of the Senate bill was regarded by all concerned as accurate and authoritative.

With regard to § 102, Senator Goldwater argued:

> "[That section] does not grant [a Title I plaintiff], even where successful in his suit, reasonable counsel fees or other costs. It thus forces him to assume the entire financial burden of the litigation. For an ordinary rank-and-file union member who is generally a wage worker, such a litigation thus becomes an impossible financial burden. In recognition of these difficulties, the Fair Labor Standards Act, for example, requiring the payment of minimum wages and premium overtime pay for certain categories of workers, permits not only the worker himself to bring a suit for nonpayment (which he may do in the State as well as the Federal courts) and to recover attorneys' fees and court costs if successful, but if the worker prefers, he may have the Secretary of Labor bring such suit in his behalf." Dept of Labor Leg. Hist. of the LMRDA pp. 308-309.

Thus, the Senator provided both a policy justification for amending § 102, and an explicit reminder, through his reference to the FLSA, that in the past, Congress had authorized attorneys' fees expressly when it wished to empower the courts to make such an award.

The argument for amending § 102 proved convincing to

a minority of the House Committee, whose dissenting views to the House Report stated:

> "One of the most serious inadequacies of the Senate Bill is the lack of any effective enforcement procedure to protect union members from those few union officials who fail to recognize that a union belongs to its members. Under that bill the individual member must shoulder the burden of litigation costs himself." Dept. of Labor Leg. Hist. of the LMRDA pp. 323-324.

The proposal to provide for attorneys' fees in Title I suits did not, however, command a majority. The House chose instead to adopt § 102 of the Senate bill.

The opinion in *Gartner* v. *Soloner*, 384 F.2d at 351-353, relied on by the court below (Pet. App. 8a-9a), dismissed Senator Goldwater's testimony as an "offhand thought" of less dignity than "floor debate," based on an inadequate analysis of the potentials for judicial innovation inherent in the phrase "such relief (including injunctions) as may be appropriate," and inconsistent with the statements of the sponsors. Cf. *Woodwork Mfrs. Assoc.*, 386 U.S. at 639-640. But this characterization of the probative value of the Senator's testimony is directly at odds with this Court's evaluation in *Hardeman*, 401 U.S. at 244. Moreover, the *Gartner* court's expansive reading of "such relief" is inconsistent with both the language and structure of the LMRDA, and with this Court's teaching that where a statute contains remedial provisions, but does not expressly authorize attorneys' fees, the presumption is that Congress did not intend to allow such fees to be awarded. See pp. 1-3 *supra*. And, as already shown, the statements of the

sponsors do not demonstrate an intent to provide for attorneys' fees.

To be sure, "when interpreting a statute," statements of the opposition which tend to "overstate [its] reach" are not to be relied upon. *Woodwork Mfrs. Assoc.*, 386 U.S. at 639-640. But Senator Goldwater was not "expressing fears" *(ibid)*, belied by the statute itself, or by the expressed intent of the sponsors. He was stating what certain language meant, with the end in view of securing an amendment which would change that meaning, and not to defeat the bill as a whole. In light of the failure of Congress to accept his proposal, the controlling authority is not the above-noted passages from *Woodwork Mfrs. Assoc.;* it is the point made by Mr. Justice Frankfurter in *Carpenter's Union* v. *NLRB*, 357 U.S. 93, 99-100:

> "It is relevant to recall that the [LMRDA] was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation * * * This is relevant in that it counsels wariness in finding by construction a broad [remedial] policy [providing for attorneys' fees] when, from the words of the statute itself, it is clear that those interested in just such a [policy] were unable to secure its embodiment in enacted law."

(d) In an effort to overcome the force of the points just made the court below surmised that "cases vindicating [Title I] rights would never be filed * * * without the discretionary authority in courts to grant counsel fees"; and posited a gross imbalance of resources between the individual and his union, "It is difficult for individual members

of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own." Pet. App. 7a-8a.

The facts are to the contrary. *Gartner* v. *Soloner*, decided on September 1, 1967, 8 years after the effective date of the LMRDA, was the first case to hold that Title I plaintiffs could secure attorneys' fees. All prior authority had been to the contrary. Yet, according to the Office of the Solicitor of the Department of Labor:

> "Since September 14, 1969, the effective date of the Act [and prior to October 25, 1967], there have been approximately 850 private actions filed under the first six titles of the L.M.R.D.A. While this office does not maintain a listing of these cases according to the particular titles involved, we estimate that 650 were filed under Title I, 30 under section 201(c) and 50 under section 501(b)." Petition for a Writ of Certiorari in *Soloner* v. *Gartner*, No. 1051, Oct. Term, 1967, pp. 17-18.

Thus, there is no substance to the proposition that "without counsel fees the grant of federal jurisdiction [in § 102] is but a gesture, for few union members could avail themselves of it." Pet. App. 8a.

We do not gainsay the proposition that Title I litigation imposes a financial burden on plaintiffs. Indeed, the debate on § 101(a)(4) noted above (p. 11), shows that Congress recognized that fact. For all of us "the expense and annoyance of litigation is 'part of the social burden of living under government.' " *Petroleum Exploration* v. *Public Service Commission*, 304 U.S. 209, 222. With few exceptions, Congress has, nevertheless, determined that plaintiffs should

bear their own litigation expenses, even where that course may work a substantial financial hardship. See e.g. *United States* v. *Kras*, ... U.S. ....., 41 U.S.L.W. 4117.

As *Kras* demonstrates, within the broadest constitutional limits, such judgments are for Congress to make. For, in many instances, of which this is one, there is no ideal solution. In the overwhelming majority of the situations covered by Title I, local unions are the labor organizations that discipline members and must answer for their actions in court. There can be no doubt that Title I was not intended to make it impossible for them to continue to carry out this disciplinary function. On the contrary, Congress was at pains to insure that § 101(a)(1)'s guarantee of equal rights would be "subject to reasonable rules and regulations in such organization's constitution and bylaws," that "nothing" in §101(a)(2)'s guarantee of freedom of speech and assembly should "be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations," and that the safeguards against improper disciplinary action should be limited to the basic elements of procedural due process (see *Hardeman*, 401 U.S. 233). But, approximately 75% of the some 48,000 local unions in this country have had annual receipts of $25,000 or less per year during the period 1960 to 1970. Dept. of Labor, Labor Management Services Admin., Union Financial Statistics 1960-1970 (Oct. 1972) Table 7, p. 26. They are not organizations with "paid union counsel at their

beck and call" (Pet. App. 8a), who can afford to defend their actions in the litigation process, which "is at best uncertain," without regard to the fact that they would be "penalized for merely defending • • • a lawsuit" *(Fleischmann,* 386 U.S. at 718). Indeed they are precisely the type of defendants who would be "unjustly discouraged from [defending] actions to vindicate their rights if the penalty for losing included the fees of their opponents counsel" *(ibid).*

Given Congress' desire to protect individual member's rights without sacrificing valid union institutional interests, the relative balance of resources available to the parties, and the price to be paid in scarce judicial resources of a contrary decision (*Fleischmann,* 386 U.S. at 718), it is not surprising that Congress chose to leave litigation costs where they lay.[5]

---

[5] To this juncture we have sought to demonstrate that in the instant case, as in *Fleischmann,* a "judicially created compensatory remedy in addition to the express statutory remedies is inappropriate • • •." (386 U.S. at 721). We now show briefly, in conclusion, that the decision below is wrong, even if it be assumed *arguendo* that the absence of an express authorization for the award of attorneys' fees in § 102 is not fatal to such a claim in all Title I cases.

The "judge-created exception" to "the general American rule," relied on explicitly by the District Court (Pet. App. 20a-21a), and implicitely by the Court of Appeals (7a-8a), is that most recently restated in *Mills,* 396 U.S. at 392:

> "Where a plaintiff has successfully maintained a suit, • • • that benefits a group of others in the same manner as himself • • • [to] allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense."

CONCLUSION

For the above stated reasons, as well as those set out in

In other words, where a plaintiff brings a suit which results in a decree which improves the legal position of others "in the same manner" as it improves the plaintiff's, the equitable doctrine of unjust enrichment requires that the costs of securing this benefit be shared by all those who enjoy it in "full." And, as a corollary of the first proposition, where the lawsuit results in a decision whose *stare decisis* effect is the equivalent of such a decree, the same result obtains. *Mills*, 396 U.S. at 392-393, citing *Sprague*, 307 U.S. 161.

In the instant case, the plaintiff secured a

> "Judgment for a mandatory permanent injunction directing that he be reinstated to membership and restored to all financial benefits accruing to members and * * * for reasonable counsel fees." Pet. App. 39a

Plainly, the only person who derived a direct benefit from that judgment was the plaintiff himself. In contrast to cases like *Mills*, where the decree resulted in reopening a transaction which had a common adverse effect on all the members of the group being assessed for attorneys' fees (the corporation's shareholders), "in the same manner as [the plaintiff] himself;" this decree runs only in favor of the plaintiff as an individual. It is therefore contrary to, rather than consistent with, equity to assess attorneys' fees here, on the basis of the effect of the decree.

To be sure, it might be argued that the decision benefits the group through its *stare decisis* effect, in that it reaffirms the proposition stated in the leading cases of *Salzhandler* v. *Caputo*, 316 F.2d 445 (C.A. 2) and *Farowitz* v. *Musicians* 330 F.2d 999 (C.A. 2) (both decided after the union acted in this case), that a member is "not subject to expulsion even though his [speech] was held by the [Union's] Trial Committee to be 'malicious vilification' or for that matter false or libelous" (Pet. App. 4a-5a). But in contrast to *Sprague*, where the *stare decisis* effect was to perfect a right of the narrowly delimited group being assessed (the right to "recover out of specific assets of the same defendant" (*Mills*, 396 U.S. at 393));

the plaintiff's brief, the award of attorneys' fees ordered

in the instant case, the reiteration of the general principle announced, rebounds to the overall advantage of all union members, and not especially to the members of the Seafarers Union. It is the latter alone, however, who are being directed to pay. This Court's opinions do not suggest that *Sprague* has so far a reach. And for good reason. The granting of a statutory right, with the rarest of exceptions, is intended to benefit a class, not a single individual. Thus, whenever a plaintiff, who invokes such a right, prevails on the basis of a reasoned opinion, his victory provides a *stare decisis* benefit to that class. But, if that were deemed to be enough, the *Sprague* rule would cease to be a "limited exception" (*Fleischmann*, 386 U.S. at 718), to "the general American rule • • • that attorneys' fees are not ordinarily recoverable" (*Mills*, 396 U.S. 391), and would become, instead, the vehicle for replacing the American rule with the English rule. Since this Court has specifically disclaimed any such intent, *Sprague* must mean that attorneys' fees are recoverable only when the *stare decisis* effect of a decision serves to advance the common interest of the specific group being assessed in achieving a discrete objective distinct from the general interest of an overall class in having certain questions of law decided in their favor. And so read, *Sprague* does not support an award of attorneys' fees here.

The sum of the matter is that the courts below entirely misunderstood the scope of the "limited exception" created by the *Sprague-Mills* line of authority, and that as a result, the attorneys' fee they authorized is in direct contravention of this Court's long-standing adherence to the proposition "that attorneys' fees are not ordinarily recoverable" (*Fleischmann*, 386 U.S. at 717-719).

below should be reversed.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006

February, 1973